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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 233

JOSEPH NELLO SPINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Joseph Nello Spino, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was entered on the 28th day of August, 1964, and is not reported but appears in the printed Appendix filed with, and certi-

fied by the Clerk of the United States Court of Appeals for the Seventh Circuit as a part of this record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on April 9, 1965. That opinion is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, was filed on the 9th day of April, 1965; on the 10th day of May, 1965 it was ordered that the petition for rehearing be denied.

This petition is filed within thirty (30) days after the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Is it not a denial of due process of law, a denial of a defendant's right to a fair trial in a criminal case, for a Federal Prosecutor to assure the jury, in final argument, of his personal knowledge that defendant was a member of the Chicago Crime Syndicate, despite the evidence?

STATUTES INVOLVED.

Title 18, Section 1952—U. S. C. A. Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3) shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States.

Title 26, Section 7206 (1) U. S. C. A.

Any person who

(1) Declaration under penalties of perjury: Wilfully makes and subscribes any return, statement. or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and

correct as to every material matter, shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00 or imprisoned not more than three years, or both.

STATEMENT OF THE CASE.

The defendant was charged by indictment in four counts; Counts I and II charged violation of Section 1952, Title 18 by traveling in interstate commerce from Illinois to Indiana with intent to promote, etc., an unlawful business enterprise described as a "monte game", alleged to be gambling in violation of the laws of the State of Indiana.

Counts III and IV charged violations of Section 7206 (1), Title 26, U. S. C., in that the defendant did, in filing an application for a wagering stamp, fail to list the names of all of his employees and agents. The jury found the defendant guilty on all four counts of the indictment; he was sentenced by the court to 18 months imprisonment on each count, to run concurrently, and fined $3,000.00.

The defenses were (1) as to the first two counts, that merely crossing a state line for private, personal card-playing for money, such as a "monte game", was not within the scope of the Anti-Racketeering Act; and that, in the absence of any evidence of ownership, possession or control by defendant of premises on which the "monte game" was played, or any equipment or personal property used in connection therewith, defendant was not connected with any "business enterprise"; and that because of the nature of the card game known as "Monte" such a game cannot be the object of a "business enterprise"; and

(2) as to the other two counts of the indictment, pertaining to defendant's activties in another and different gambling game, known as "Bolita" or "Spanish Num-

bers", defendant did not in good conscience consider as his employees or authorized agents the persons named in the indictment as his undeclared agents, and therefore believed that his verified applications were true.

THE TRIAL EVIDENCE.

As to the matters which finally became the controverted issues in the case, there was only one witness for the government, an undercover agent of the Treasury Department, by name, Michael Gonzales. The competence of Gonzales to testify accurately of the operations of two gambling games, "Puerto Rican Monte" and "Spanish Numbers", in which he was admittedly non-expert, and his credibility as a fair and impartial witness were strenuously attacked by defendant.

Gonzales testified that he saw defendant playing "Monte" on designated premises, but also saw many others playing; he saw defendant "banking" the game, but also saw other players "banking" the game, but as the game is played, according to the evidence, that is the game, for one of the players, in turn, to act as "banker". Gonzales further testified that he did not know how "the house" could make any money off of a "Monte Game"; he did not know who owned or leased the premises or contents. Gonzales further testified that he gave money to persons not listed on defendant's applications for wagering stamps, for making bets on a lottery game known as Bolita, or Spanish Numbers, but admitted that he did not know whether or not it was true that anyone and everyone was eligible to solicit or accept bets and turn them in for a discount or commission.

On the other hand, the evidence given by defendant and his several witnesses was clear and preponderant that defendant had no connection with the Monte game except as

a player; that he had no connection with the premises except as a customer, patron or game-player; that when he, some months later, took over a bankrupt lottery operation, he hired only one employee, named in his applications; that persons bringing in lottery bets were on their own, not agents of his.

REASONS FOR GRANTING THE WRIT.

As his reason for asking this court to exercise its jurisdiction in this case petitioner relies upon its Rule 19 (1) (b), more specifically:

Where a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Petitioner's complaint is that Federal courts, District courts and courts of appeal, are ever-increasingly favoring Federal prosecutors by their tolerance of prejudicial misconduct by prosecutors in argument to the jury; that previous bad decisions by the courts are cited to bolster and justify worse decisions and that unless some reasonable ground rules for proper argument are set by this court an intolerable situation already developed can grow only more injurious to the rights of defendant.

In this case petitioner presented to the jury for its consideration important and serious questions of law and fact, including a vital issue of defendant's intent, innocent or guilty, in the commission of acts admittedly done by him. He was entitled to have them consider whether or not, when he made trips to Indiana from Illinois, as he admittedly did, he did so with intent to establish, etc., a business enterprise, to wit: a monte game, as charged; and he was further entitled to have them consider whether or not, in his appli-

cations for wagering stamps in connection with his lottery operation, he himself thought of all of the people accustomed to bringing in lottery bets as his employees and agents, or whether it was his belief, as Section 7206 (1), Title 26 so limits the proscribed action, regardless of what others might think, that these people were not his employees and agents.

Petitioner was entitled to have a jury which was considering such questions vital to him to be completely open-minded and uninfluenced by prejudice manufactured by the government.

In the trial of this cause the prosecution was obviously aware of the possible weakness of its case with only one witness, especially since another witness, whose existence and identity had been concealed by the undercover witness, Gonzales, from his employer, the government, but brought to light on cross-examination, was neither produced nor his absence accounted for; to counter-balance such weakness by showing up the defendant as an unsavory character probably not worthy of any fairness or consideration by the jury of respectable folks, effort was first made by the prosecution to get across to the jury by irrelevant questions designed only to plant seeds of suspicion and speculation as to defendant's possible connection with the Chicago Crime Syndicate; and when these reprehensible tactics did not seem to the prosecution to have surely accomplished the desired intention the Federal prosecutor, in his final argument to the jury, dared to put in the clincher, to state to the jury his personal knowledge that defendant took his orders from Chicago.

Despite the fact that the trial court sustained an objection to the astounding misconduct of the prosecutor and instructed the jury that there was no evidence of such accusation, petitioner says that any jury of ordinary laymen

would be psychologically incapable of ignoring the information just given to them by the United States Government even though there was some technical irregularity about the manner in which they were told. The consequence was that after a trial extending into a third day, and after hearing some eleven witnesses and having seen many exhibits, and having heard and received 26 instructions from the court as to the issues and being charged to consider the evidence on every material matter in each of the four counts of the indictment, this jury took less than half an hour to find defendant guilty on all four counts of the indictment. They had no doubts about the guilt of one who, they had just been told by their government, was a member of the Chicago Crime Syndicate!

The method by which the government insinuated the Chicago Crime Syndicate into the case was, first, to have their witness, Gonzales, testify to having seen a newspaper shown to him by defendant "which had a headline on it about the Syndicate in Chicago"; this testimony was apropos of nothing, only an immaterial interjection, but had the effect of injecting into the hearing within the jury's hearing, the words "Chicago Syndicate"; it was not connected or related to defendant in any way. The next step in the prosecution's course of misconduct came when defendant and the prosecutor asked him whether his orders came from Chicago, to which defendant answered, no; then asked him as to his acquaintance with three named individuals not otherwise identified and with no connection with the case but with sinister sounding and gangster-type names such as "Canito" and "Tokyo Joe". Who they actually were or are was not further gone into or developed by the government, leaving the jury only with the speculation that they were probably criminal hoodlums. All of this was topped off by the prosecutor's statement in final argument to the jury wherein he told the jury that he knew,

despite defendant's previous denial, that defendant took his orders from Chicago.

Petitioner says that the irreparable damage done to defendant's right to a fair trial by the misconduct of the government is a violation of his constitutional rights.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN N. STANTON,
Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1964—April Session, 1965.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOSEPH NELLO SPINO, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 14829

April 9, 1965.

Before KNOCH, CASTLE and KILEY, *Circuit Judges.*

KNOCH, *Circuit Judge.* Defendant, Joseph Nello Spino, was charged in a four-count indictment with (two counts) interstate travel (between Illinois and Indiana) in aid of an unlawful activity under Indiana law in violation of Title 18 U. S. C. § 1952, and with (two counts) wilfully and knowingly making, subscribing, and filing a false wagering tax return on May 4 and May 31, 1962, by failing to list four agents (other than the one he had listed) who were receiving wagers on defendant's behalf, in violation of Title 26 U. S. C. § 7206(1).

The jury found defendant guilty on all four counts. He was sentenced to serve eighteen months on each count, concurrently, and fined $3,000.

Defendant lists the following as errors:

1. The verdict is not supported by substantial evidence such as to establish guilt beyond a reasonable doubt.

2. The court erred in denying defendant's motions for judgment of acquittal as to each count of the indictment.

3. The prosecutor committed prejudicial misconduct during his summation and argument to the jury, testifying to them as a fact his inside mis-information.

4. Title 18, U. S. C. A. Interstate Travel in Aid of Racketeering is unconstitutional.

Title 18, U. S. C. § 1952, prohibits travel in interstate commerce by any mode of transport with the intent to promote, carry on, or facilitate the carrying on of a business enterprise involving gambling in violation of the laws of the state where it is carried on. *U. S.* v. *Zizzo,* 7 Cir., 1964, 338 F. 2d 577. In that decision, at page 579, this Court upheld the constitutionality of the statute.

We must view the evidence, of course, in the light most favorable to the government and may reject no inferences properly deducible from that evidence. *U. S.* v. *Shaffer,* 7 Cir., 1961, 291 F. 2d 689, 691; *Glasser* v. *U. S.,* 315 U. S. 60, 80 (1942); *U. S.* v. *Coduto,* 7 Cir., 1960, 284 F. 2d 464, 466.

Defendant was under extensive surveillance by special agents of the Internal Revenue Service, U. S. Treasury Department, whose testimony was offered at the defendant's trial. These special agents testified to numerous instances of defendant's interstate travel between locations

in Chicago and Cicero, Illinois, to 3460 Pennsylvania Avenue, East Chicago, Indiana, where gambling activity in violation of Indiana Statutes (§§ 10-2304, 10-2307, 10-2312, Burns Ind. Stat. 1956 Replacement) was in operation. A representative of the Illinois Bell Telephone Company testified to telephone calls between defendant's home in Chicago and the East Chicago, Indiana, location.

There was further testimony from which the jury could reasonably have concluded that defendant was the man in charge of the operations in East Chicago, and the jury could have inferred with equal reason that he was being financed by sources in Chicago, Illinois.

Defendant states that he did not operate the East Chicago establishment until June, 1962, when he took over a lease from Frank Santos, also known as Efrain Frank Santos, who had rented the premises in December, 1961, and who paid the rent until June 1, 1962. Mr. Santos testified that he brought in a pool table and a poker table which he later removed to allow one Johnny Reveira to bring in a Monte table and equipment for Bolita, a numbers game played with a cage of ping pong balls, on which bets could be brought in for bettors who were not present at the drawings. Special Agent Michael Gonzales testified to placing Bolita bets in May and June, 1962, with Castro Rosado, Genaro Ruiz, Frank Vasquez and Augustin Flores. The last two denied working for the defendant and testified that they took Special Agent Gonzales' bets in only as a personal favor to him.

There was considerable testimony about Monte and the nature of its operation. Defendant and other witnesses testified that the players in Monte conduct their own card game, the table being made available merely as an accommodation from which the "house" takes no profit; that anybody can serve as the banker from whom the dealer re-

ceives a gratuity for his services if the banker wins. There was conflicting testimony as to the extent of the defendant's participation in these Monte games, including evidence that defendant was seen taking away a large sum of money from the Monte table. There was also testimony that defendant had something to do with the nightly drawing in the Bolita game.

It is defendant's contention that he did not operate the East Chicago establishment until after it had been closed and remodeled in April and May, and after he had moved to Indiana. He applied for a wagering stamp before the establishment reopened and he stated that he hired only Mr. Santos to work for him. Mr. Santos testified to the same effect, and stated that Reveira had conducted the numbers business until late April, 1962.

Defendant testified that the four men listed above made bets only for themselves and sometimes for their friends but that they did not work for defendant; that anybody who brought in bets, employee or not, would receive a cash discount.

Special Agent Gonzales testified that these four men were accepting wagers from others and turning them in to defendant or to his acknowledged agent Santos, usually in defendant's presence.

The jury could have resolved the conflict in this testimony by deciding that the defendant did know the four named men were accepting bets for him when he executed the forms setting out only the name of Mr. Santos. *Zambito* v. *U. S.*, 4 Cir., 1963, 315 F. 2d 266, cert. den. 373 U. S. 924.

Defendant argues that the jury failed to give fair consideration to the various issues which turned on the jury's estimate of the credibility of the witnesses because of the misconduct of the prosecutor. The prosecutor asked de-

fendant whether his orders came from Chicago. Defendant denied that his orders came from Chicago and when asked whether he knew certain persons named by the prosecutor, said that he had "no idea." No objection was made at that time. In argument to the jury, the prosecutor said:

> You heard Special Agents Poppa and Stevens testify that they trailed the defendant from Chicago to East Chicago, from Chicago, Illinois, to East Chicago, Indiana.
>
> Why he traveled is something that you have to decide —I can tell you why, the defendant takes orders from Chicago—

Objection to that statement was sustained. The jury were instructed to disregard it.

We have given careful consideration to defendant's assertion that despite the instructions of the Court the jury must have assumed from the statement that the prosecutor had told them that "he could personally assure them that the defendant was an agent of dark forces in Chicago."

We cannot agree that in the context of the remarks the effect on the jury was that pictured by the defendant, and that the result of the comment was so prejudicial as to require reversal of the conviction. *U. S.* v. *Zizzo,* 7 Cir., 1964, 338 F. 2d 577, 581.

The judgment of the District Court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago, Illinois, 60610.

April 9, 1965.

Before

Hon. Win G. Knoch, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSEPH NELLO SPINO,
Defendant-Appellant.

No. 14829

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago, Illinois, 60610.

Monday, May 10, 1965.

Before

Hon. Win G. Knoch, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOSEPH NELLO SPINO, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 14829

It is ordered by the court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 233

JOSEPH NELLO SPINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11–15; C.A. 1–5)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1965. A petition for rehearing was denied on May 10, 1965. The petition for a writ of certiorari was filed on June 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "C.A." refers to the volume containing the opinion, judgment, and order of the court of appeals. "R." refers to the printed appendix setting forth the trial proceedings.

779-205—65

QUESTION PRESENTED

Whether, in a trial for interstate travel between Chicago and Indiana in aid of an illegal gambling venture, it was reversible error for the government attorney to argue in his summation that petitioner took his orders from Chicago.

STATEMENT

In the United States District Court for the Northern District of Indiana, petitioner was tried by a jury on two counts charging interstate travel from Illinois to Indiana in order to promote and carry on an unlawful gambling operation, in violation of 18 U.S.C. 1952, and on two counts charging willful filing of false wagering tax returns, in violation of 26 U.S.C. 7206(1). He was convicted on all counts, was sentenced to concurrent terms of eighteen months imprisonment on each count, and was fined $3,000 (R. 256–257). The court of appeals unanimously affirmed the conviction.

The pertinent evidence demonstrated that on several occasions in early 1962 petitioner drove from his home in Chicago, Illinois, to a gambling establishment in East Chicago, Indiana (R. 61–72). When petitioner arrived at the establishment a "Monte" game began (R. 12–13). Petitioner stood near the table, watching the cards being dealt and the money being paid, and sometimes relieved one of the dealers while he took a brief rest (R. 13, 17). The dealers called to petitioner when they needed more money, and petitioner responded by placing stacks of bills

on the table beside them (R. 42, 53). He once referred to the stacks of currency in front of a dealer as his money (R. 13); and, when acting as dealer, he occasionally pocketed part of the dealer's currency reserve (R. 8). On numerous evenings, petitioner answered a telephone, then turned to one of the men present and told him it was "okay". The men thereupon went to the basement and returned with the equipment for a "Bollita" drawing (R. 13–19, 24). Under petitioner's direction the door was locked and the drawing conducted (R. 14, 16, 18, 24–25, 43), after which petitioner placed a telephone call and recited the winning number (R. 15). Telephone company records showed several calls between petitioner's home in Chicago and either the gambling establishment or the residence of one of the employees in Indiana (R. 55, 57–59, 127, 196).

An undercover agent of the Internal Revenue Service testified that petitioner had told him that the house "take" on the Monte game was 25%, and "that the Monte Game and the Bollita Game came out of Chicago" (R. 9). Petitioner also told the agent that if the dealers did not appear for work they would receive no pay, but "if he didn't come to work he would still get paid" (R. 12). Once the agent overheard petitioner and an employee discuss whether the proceeds of an evening's activity would be taken to Chicago that night or the next morning (R. 80, 82). The agent testified that, at a later date, some time after petitioner had moved from Chicago and had become a resident of Indiana, he showed a newspaper

with a headline about the "Syndicate in Chicago," and petitioner said he "was glad he was not in Chicago anymore, that he would stay here in Indiana" (R. 78). Petitioner, on cross-examination, denied that his "orders" came "from Chicago" (R. 226).

During his summation the government counsel argued (R. 233):

> * * * You heard Special Agents Poppa and Stevens testify that they trailed the defendant from Chicago to East Chicago, from Chicago, Illinois, to East Chicago, Indiana.
>
> Why he traveled is something that you have to decide—I can tell you why, the defendant takes his orders from Chicago——

Petitioner's counsel objected to this argument and was sustained (R. 233). At the conclusion of the summation a defense motion for a mistrial was denied (R. 238–239), but the court instructed the jury (R. 239):

> During the course of the argument there was some reference made by the United States Attorney to the effect that the defendant takes orders from Chicago. I instruct you to disregard that statement and not to consider it in any way in your deliberations, because it is outside the scope of the evidence in this case, and therefore should not be considered by you.

Additionally, during its general charge, the court instructed that "if counsel inadvertently * * * misstate the evidence * * * you will take the evidence detailed by the witnesses and shown by the documents introduced instead of the statements of counsel."

(R. 252). The jury was admonished to give no consideration whatever to matters which had been stricken from the record (R. 253).

ARGUMENT

There is no merit to petitioner's contention that the final argument of the government attorney was so prejudicial as to require reversal. The only matter claimed to be offensive was the statement that petitioner "takes his orders from Chicago." Anything tending to explain the intent with which the trips were undertaken was relevant to the offenses charged in the first two counts. Since the statement represented a permissible inference from the evidence adduced at trial, it was not an improper subject for argument even though the trial court sustained an objection. *Isaacs* v. *United States,* 301 F. 2d 706 (C.A. 8), certiorari denied, 371 U.S. 818. Petitioner contends that the statement, in conjunction with a witness's earlier reference to a "Syndicate in Chicago," implied that the government attorney knew of some connection between petitioner and a nefarious criminal enterprise based in Chicago. As noted by the court below (Pet. App. 15), the context of the remark did not lend itself to such an interpretation. In addition, the trial court's explicit instructions to disregard the reference to orders from Chicago were sufficient to eliminate any problem on this score. *United States* v. *Frascone,* 299 F. 2d 824, 828 (C.A. 2), certiorari denied, 370 U.S. 910.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

JULY 1965.

U.S. GOVERNMENT PRINTING OFFICE : 1965